

FILED

SEP 22 2010

CLERK, U.S. DISTRICT COURT

By _____ Deputy

ORIGINAL

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF TEXAS
 3 DALLAS DIVISION

4 EQUAL EMPLOYMENT OPPORTUNITY §
 5 COMMISSION, §
 6 §
 7 Plaintiff, §
 8 § Civil Action No. 3:08-CV-1552-D
 9 VS. §
 10 §
 11 SERVICE TEMPS, INC., d/b/a §
 12 SMITH PERSONNEL SOLUTION, §
 13 §
 14 Defendant. §

15 **COURT'S CHARGE TO THE JURY**

16 MEMBERS OF THE JURY:

17 Now that you have heard all of the evidence and the argument of counsel, it becomes my
 18 duty to give you the instructions of the court concerning the law applicable to this case.

19 It is your duty as jurors to follow the law as I shall state it to you and to apply that law to the
 20 facts as you find them from the evidence in the case. You are not to single out one instruction as
 21 stating the law, but must consider the instructions as a whole. Neither are you to be concerned with
 22 the wisdom of any rule of law stated by me.

23 Regardless of any opinion you may have as to what the law is or ought to be, it would be a
 24 violation of your sworn duty to base a verdict upon any view of the law other than that given in these
 25 instructions, just as it would also be a violation of your sworn duty, as judges of the facts, to base
 26 a verdict upon anything other than the evidence in the case.

27 In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as
 28 to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or
 29 public opinion. The parties and the public expect that you will carefully and impartially consider

30 all of the evidence in the case, follow the law as stated in these instructions, and reach a just verdict
31 regardless of the consequences.

32 This case should be considered and decided by you as an action between persons of equal
33 standing in the community and holding the same or similar stations in life. The law is no respecter
34 of persons, and all persons stand equal before the law and are to be dealt with as equals in a court
35 of justice.

36 As stated earlier, it is your duty to determine the facts, and in so doing you must consider
37 only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony
38 of the witnesses, the exhibits admitted in the record, and the stipulated facts. Stipulated facts must
39 be regarded as proven facts. The term "evidence" does not include anything that I have instructed
40 you to disregard.

41 Evidence admitted before you for a limited purpose may not be considered for any purpose
42 other than the limited purpose for which it was admitted.

43 Remember that any statements, objections, or arguments made by the lawyers are not
44 evidence in the case. The function of the lawyers is to point out those things that are most
45 significant or most helpful to their side of the case and, in so doing, to call your attention to certain
46 facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your
47 own recollection and interpretation of the evidence that controls in the case. What the lawyers say
48 is not binding upon you. If an attorney's question contained an assertion of fact that the witness did
49 not adopt, the assertion is not evidence of that fact.

50 You are not bound by any opinion that you might think I have concerning the facts of this
51 case, and if I have in any way said or done anything that leads you to believe that I have any opinion

52 about the facts in this case, you are instructed to disregard it. Further, nothing in these instructions
53 to you is made for the purpose of suggesting or conveying to you an intimation as to what verdict
54 I think you should find.

55 Although you should consider only the evidence in the case, you are permitted to draw such
56 reasonable inferences from the testimony and exhibits as you feel are justified in the light of
57 common experience. In other words, you may make deductions and reach conclusions that reason
58 and common sense lead you to draw from the facts established by the evidence in the case.

59 You should not be concerned about whether the evidence is direct or circumstantial. "Direct
60 evidence" exists when the evidence directly establishes the facts that a party asserts to be true, such
61 as by an eye witness or in a document. "Circumstantial evidence" is proof of a chain of facts and
62 circumstances that, without going directly to prove the existence of an essential fact, gives rise to
63 a logical inference that such fact does actually exist. The law makes no distinction between the
64 weight you may give to either direct or circumstantial evidence.

65 Now, I have said that you must consider all of the evidence. This does not mean, however,
66 that you must accept all of the evidence as true or accurate.

67 You are the sole judges of the "credibility" or believability of each witness and the weight
68 to be given to the witness' testimony. In weighing the testimony of a witness, you should consider
69 the witness' relationship to a particular party; the witness' interest, if any, in the outcome of the
70 case; the witness' manner of testifying; the witness' opportunity to observe or acquire knowledge
71 concerning the facts about which the witness testified; the witness' candor, fairness, and
72 intelligence; and the extent to which the witness' testimony has been supported or contradicted by
73 other credible evidence. You may, in short, accept or reject the testimony of any witness, in whole

74 or in part.

75 Also, the weight of the evidence is not necessarily determined by the number of witnesses
76 testifying as to the existence or nonexistence of any fact. You may find that the testimony of a
77 smaller number of witnesses as to any fact is more credible than the testimony of a larger number
78 of witnesses to the contrary.

79 A witness may be "impeached" or discredited by contradictory evidence, by a showing that
80 the witness testified falsely concerning a material matter, or by evidence that at some other time the
81 witness said or did something, or failed to say or do something, that is inconsistent with the witness'
82 present testimony. If you believe that any witness has been so impeached, it is your exclusive
83 province to give the testimony of that witness such credibility or weight, if any, as you think it
84 deserves.

85 The rules of evidence provide that if scientific, technical, or other specialized knowledge will
86 assist the jury to understand the evidence or to determine a fact in issue, a witness qualified as an
87 expert by knowledge, skill, experience, training, or education may testify and state an opinion
88 concerning such matters if the testimony is based upon sufficient facts or data, the testimony is the
89 product of reliable principles and methods, and the witness has applied the principles and methods
90 reliably to the facts in the case.

91 You should consider each expert opinion received in evidence in this case and give it such
92 weight as you may think it deserves. If you should decide that the opinion of an expert witness is
93 not based upon sufficient knowledge, skill, experience, training, or education, or if you should
94 conclude that the reasons given in support of the opinion are not sound, or that the opinion is not
95 based upon sufficient facts or data, or that the opinion is outweighed by other evidence, or that the

96 opinion is not the product of reliable principles and methods, or that the witness has not applied the
97 principles and methods reliably to the facts in the case, then you may disregard the opinion entirely.

98 The plaintiff has the burden of proving each essential element of its claim by a
99 “preponderance of the evidence.” A preponderance of the evidence means such evidence as, when
100 considered and compared with that opposed to it, has more convincing force and produces in your
101 minds a belief that what is sought to be proved is more likely true than not true. To establish a claim
102 by a “preponderance of the evidence” merely means to prove that the claim is more likely so than
103 not so.

104 In determining whether any fact in issue has been proved by a preponderance of the
105 evidence, the jury may consider the testimony of all the witnesses, regardless of who may have
106 called them, and all the exhibits received in evidence, regardless of who may have produced them.

107 If the proof should fail to establish any essential element of the plaintiff’s claim by a
108 preponderance of the evidence, the jury must find against the plaintiff.

109 During the trial of this case certain testimony has been introduced by way of deposition. A
110 deposition is the sworn, recorded answers to questions asked a witness in advance of the trial.
111 Deposition testimony can be introduced for the purpose of impeaching or discrediting a witness.
112 If, in the deposition, the witness made any statements in conflict with testimony the witness gave
113 in court, you may consider such conflicts and any explanation therefor in determining the witness’
114 credibility.

115 As used in this charge, the term “EEOC” means plaintiff Equal Employment Opportunity
116 Commission, “Moncada” means Jacquelyn Moncada, and “Smith” means defendant Service Temps,
117 Inc. d/b/a Smith Personnel Solution.

118 As a corporation, Smith can act only through natural persons as its agents or employees. In
119 general, any agent or employee of a corporation may bind the corporation by acts and declarations
120 made while acting within the scope of the authority delegated to the employee by the corporation,
121 or within the scope of the person's duties as an employee of the corporation.

122 EOC'S DISABILITY DISCRIMINATION CLAIM

123 The Americans with Disabilities Act of 1990 ("ADA") makes it unlawful for an employer
124 to intentionally discriminate against a qualified individual with a disability because of the
125 individual's disability. By law, the EEOC is permitted to sue on behalf of a person whom it
126 contends has been subjected to disability discrimination. The EEOC alleges that Smith
127 discriminated against Moncada by failing or refusing to hire her because of her disability (severe
128 to profound hearing loss). It sues to recover damages on behalf of Moncada. Smith denies that it
129 discriminated against Moncada because of her disability.

130 To establish this claim on behalf of Moncada, the EEOC must prove each of the following
131 essential elements by a preponderance of the evidence:

132 First, that Moncada has a disability;

133 Second, that Moncada was qualified for the job for which she
134 applied; and

135 Third, that Smith refused to hire her because of her disability.

137 The EEOC does not have to prove that Moncada's disability was the only reason Smith failed
138 or refused to hire her.

139 If you disbelieve the reason Smith has given for its decision, you may infer that Smith failed
140 or refused to hire Moncada because of her disability.

141 Disability means (1) a physical or mental impairment that substantially limits one or more
142 major life activities; or (2) a record of such an impairment; or (3) being regarded as having such an
143 impairment.

144 A person is substantially limited in a major life activity if she is (1) unable to perform the
145 activity; or (2) significantly restricted in the condition, manner, or duration under which she can
146 perform the activity as compared to the average person in the general population.

147 The following factors should be considered in determining whether an individual is
148 substantially limited in a major life activity: (1) the nature and severity of the impairment; (2) the
149 duration or expected duration of the impairment; and (3) the permanent or long term impact, or the
150 expected permanent or long term impact, of or resulting from the impairment.

151 A major life activity is an activity that is important or significant, but it does not necessarily
152 have to be public, economic, or undertaken daily. Major life activities are those basic activities that
153 the average person in the general population can perform with little or no difficulty, and they
154 include, but are not limited to, such things as caring for oneself, performing manual tasks that are
155 central to daily life, walking, seeing, hearing, speaking, breathing, learning, working, eating, lifting,
156 reaching, sitting, standing, and reproduction.

157 A person has a record of such an impairment if she has a history of, or has been misclassified
158 as having, a mental or physical impairment that substantially limits one or more major life activities.

159 A person is regarded as having such an impairment if she: (1) has a physical or mental
160 impairment that does not substantially limit major life activities, but is treated by Smith as having

161 a substantially limiting impairment; or (2) has a physical or mental impairment that substantially
162 limits one or more major life activities, but only because of the attitudes of others toward the
163 impairment; or (3) has no actual impairment at all, but is treated by Smith as having a substantially
164 limiting impairment.

165 A qualified individual is one who, with or without reasonable accommodations, can perform
166 the essential functions of the job.

167 Essential functions are those that are fundamental to the job at issue. The term does not
168 include the marginal functions of a job.

169 QUESTION NO. 1:

170 Did the EEOC prove each of the essential elements of its disability discrimination claim on
171 behalf of Moncada?

172 Instruction: The EEOC has the burden of proof. If it has met its
173 burden, answer "Yes;" otherwise, answer "No."

174 ANSWER: YES

175 If you have answered Question No. 1 "Yes," read the following instructions regarding
176 compensatory damages and answer Question No. 2. Otherwise, proceed to the court's instructions
177 concerning jury deliberations.

COMPENSATORY DAMAGES

If you find that Smith is liable in this case, then you must determine an amount that is fair compensation for Moncada's damages.

You should not interpret the fact that I am giving instructions about damages as an indication in any way that I believe the EEOC should, or should not, win this case. It is your first task to decide whether Smith is liable. I am instructing you on damages only so that you will have guidance in the event you decide that Smith is liable and that the EEOC is entitled to recover damages on Moncada's behalf.

You may award compensatory damages only for injuries that the EEOC proves were caused by Smith's allegedly unlawful conduct. The damages that you award must be fair compensation, no more and no less. Compensatory damages are not allowed as a punishment against a party.

Back pay is the amount of money that, as of the date of trial, would put Moncada in the same position that she would have held but for the discrimination in question. In other words, back pay is the value of wages and employee benefits (including pension and other retirement benefits) that Moncada would have received, less any amounts that she actually earned from other employment, from the date Smith failed or refused to hire her until the present.

You may award compensatory damages for emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life if you find that any such damages were caused by Smith's violation of the ADA. Emotional harm is not to be presumed. To prove that Moncada suffered emotional harm, the EEOC must establish the existence, nature, and severity of the emotional harm. In other words, there must be some specific discernable injury to her emotional state. Emotional harm may manifest itself through sleeplessness, anxiety, stress, depression, marital

200 strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous
201 breakdown. It may also be exhibited through physical symptoms such as gastrointestinal disorders,
202 hair loss, headaches, and similarly serious maladies.

203 No evidence of the monetary value of such intangible things as pain and suffering need be
204 introduced in evidence. There is no exact standard for fixing the compensation to be awarded for
205 these elements of damage. Any award you make should be fair in light of the evidence presented
206 at the trial. Mental anguish implies a relatively high degree of mental pain and distress. It is more
207 than mere disappointment, anger, resentment, or embarrassment, although it may include all of these.
208 It includes a mental sensation of pain resulting from such painful emotions as grief, severe
209 disappointment, indignation, wounded pride, shame, despair, or public humiliation.

210 In determining the amount of any damages that you decide to award, you should be guided
211 by dispassionate common sense. You must use sound discretion in fixing an award of damages,
212 drawing reasonable inferences from the facts in evidence. You may not award damages based on
213 sympathy, speculation, or guess work. On the other hand, the law does not require that the EEOC
214 prove Moncada's losses with mathematical precision, but only with as much definiteness and
215 accuracy as circumstances permit.

216 An award of future damages necessarily requires that monetary payment be made now for
217 a loss that Moncada will not actually suffer until some future date. If you should find that Moncada
218 is entitled to future damages, then you must determine the present value or worth, in dollars, of such
219 future damages.

220 QUESTION NO. 2:

221 What amount of compensatory damages, if any, should be awarded to the EEOC on
222 Moncada's behalf?

223 **Instruction:** The EEOC has the burden of proof. Answer in dollars and
224 cents, if any. Consider the elements of damages listed below and none other.
225 Consider each element separately. Do not include damages for one element
226 in the other element. Do not include interest on any amount of damages you
227 find.

228 ANSWER:

229 Back pay \$14,400.00

230 Emotional pain and suffering,
231 inconvenience, mental anguish
232 and loss of enjoyment of life
233 in the past

\$14,400.00

\$20,000.00

234 Emotional pain and suffering,
235 inconvenience, mental anguish
236 and loss of enjoyment of life
237 that in reasonable probability
238 will be incurred in the future

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If you have answered Question No. 1 "Yes," read the following instructions regarding punitive damages and answer Question No. 3. Otherwise, proceed to the court's instructions concerning jury deliberations.

PUNITIVE DAMAGES

If the EEOC proves by a preponderance of the evidence that Smith discriminated against Moncada with malice or with reckless indifference to her right to be free from disability discrimination, the law allows you, but does not require you, to award punitive damages. The purposes of an award of punitive damages are, first, to punish a wrongdoer for misconduct and,

247 second, to warn others against doing the same.

248 An action was in “reckless indifference” to Moncada’s federally protected rights if it was
249 taken in the face of a perceived risk that the conduct would violate federal law. The EEOC is not
250 required to show egregious or outrageous discrimination to recover punitive damages. However,
251 proof that Smith engaged in intentional discrimination is not enough in itself to justify an award of
252 punitive damages.

253 In order for Smith to be liable for punitive damages, the EEOC must prove that the agent of
254 Smith of whose conduct the EEOC complains (1) was employed in a position of managerial
255 capacity, (2) acted within the scope of employment, and (3) acted with malice or reckless
256 indifference to Moncada’s right not to be discriminated against based on disability. Reckless
257 indifference means that Smith acted in light of a perceived risk that its conduct violated the laws
258 prohibiting discrimination.

259 Additionally, you cannot award punitive damages against Smith if Smith proves that its
260 agent’s actions regarding Moncada were contrary to Smith’s good faith efforts to prevent
261 discrimination in the workplace. Examples of such efforts are putting in place and adhering to a
262 policy against disability discrimination, training employees, and investigating complaints about such
263 conduct.

264 If you determine that Smith’s conduct justifies an award of punitive damages in favor of the
265 EEOC on behalf of Moncada, you may award an amount of punitive damages that all jurors agree
266 is proper. In determining the amount, you should consider the following questions: How offensive
267 was the conduct? What amount is needed, considering Smith’s financial condition, to prevent future
268 repetition? Does the amount of punitive damages have a reasonable relationship to the actual

269 damages awarded? In making any award of punitive damages, you should consider that the purposes
270 of punitive damages are to punish a defendant and to deter the defendant and others from engaging
271 in similar conduct in the future. If you decide to award punitive damages, you must use sound
272 reason in setting the amount of the damages. The amount of an award of punitive damages must not
273 reflect bias, prejudice, or sympathy toward any party. It should be presumed that Moncada has been
274 made whole by compensatory damages, so punitive damages should be awarded only if Smith's
275 misconduct, after having paid compensatory damages, is sufficient to warrant the imposition of
276 further sanctions to achieve punishment or deterrence.

277 QUESTION NO. 3:

278 What amount of punitive damages, if any, should be awarded to the EEOC on behalf of
279 Moncada?

280 Instruction: The EEOC has the burden of proof, except regarding
281 good faith efforts to comply with the law. Answer in dollars and
282 cents, if any.

283 ANSWER: \$150,000.00

285 Jury Deliberations

286 The fact that I have given you in this charge instructions about a particular claim, or that I
287 have not so instructed you, should not be interpreted in any way as an indication that I believe a
288 particular party should, or should not, prevail in this case.

289 In order to return a verdict your verdict must be unanimous. It is your duty as jurors to
290 consult one another and to deliberate with a view towards reaching an agreement. Each of you must
291 decide the case for yourself, but only after an impartial consideration with each other of all the

292 evidence in the case. In the course of your deliberations, do not hesitate to reexamine your own
293 view and change your opinion if convinced it is erroneous. Do not, however, surrender your honest
294 conviction as to the weight or effect of the evidence solely because of the opinion of other jurors or
295 for the mere purpose of returning a verdict. Remember at all times that you are not partisans. You
296 are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

297 After I finish reading this charge, you will retire to the jury room. I will send you the
298 exhibits that have been admitted into evidence. You will first select one member of the jury to act
299 as presiding juror. The presiding juror will preside over your deliberations and will speak on your
300 behalf here in court.

301 Do not deliberate unless all members of the jury are present in the jury room. In other words,
302 if one or more of you go to lunch together or are together outside the jury room, do not discuss the
303 case.

304 When you have reached unanimous agreement as to your verdict, the presiding juror shall
305 fill in your answers to the questions on a copy of the charge that I will provide to you for this
306 purpose, shall date and sign the last page of that copy of the charge, and shall notify the court
307 security officer that you have reached a verdict. The court security officer will then deliver the
308 verdict to me.

309 The court will honor the schedule you set for your deliberations and your requests for breaks
310 during your deliberations. From time to time I may communicate with you concerning your
311 schedule. This is done primarily for the purpose of anticipating the court's staffing needs, and is not
312 in any way intended to suggest that your deliberations should be conducted at a different pace or on
313 a different schedule.

During the trial, the court reporter made a verbatim record of the proceedings. The court rules do not provide for testimony to be produced for the jury in written form, or for testimony to be read back to the jury as a general aid in refreshing the jurors' memories. In limited circumstances, the court may direct the court reporter to read testimony back to the jury in open court. This is done, however, only when the jury certifies that it disagrees as to the testimony of a particular witness, and identifies the specific testimony in dispute.

If, during your deliberations, you desire to communicate with me, your presiding juror will reduce your message or question to writing, sign it, and pass the note to the court security officer, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by asking you to return to the courtroom so that I can address you orally. If you do send a message or ask a question in which you indicate that you are divided, never state or specify your numerical division at the time.

326 September 21, 2010.

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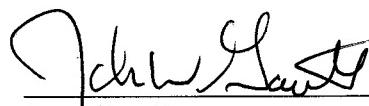
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Sidney A. Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

331 The foregoing is the unanimous verdict of the jury.

332 Dated: 9-22-10


John Gandy
Presiding Juror